STATE OF MICHIGAN

COURT OF APPEALS

BONNIE FERGUSON,

Plaintiff-Appellee,

v

MICHAEL V. GLAZE, FRANCES GLAZE, GLEN TAYLOR and ASSOCIATED REMEDIAL TECHNOLOGIES, INC.,

Defendants-Appellants.

UNPUBLISHED
February 5, 2008

No. 268586
Genesee Circuit Court
LC No. 03-077534-CK

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Defendants appeal as of right the judgment in favor of plaintiff regarding a promissory note. Defendants, Frances Glaze ("Frances"), Glen Taylor ("Taylor"), and Associated Remedial Technologies, Inc. ("ART"), also challenge the judgment for case evaluation costs. We affirm in part and reverse in part.

I. Basic Facts And Procedure

Defendant Michael Glaze (Michael), on behalf of CTI Environmental Services, Inc. ("CTI"), a Michigan corporation, performed services for a company, Richfield Landfill, Inc. ("Richfield"), which was owned by plaintiff and her husband, Ronald Ferguson. Three shareholders, Michael, the president, Purushottam Deo, the vice president, and Robert Near managed CTI, which performed environmental services, contracting work, and remedial actions. In 1991, Michael began having a dispute with Deo and Near. On June 29, 1991, Michael, unbeknownst to Deo and Near and therefore in violation of CTI's charter requiring all shareholders' approval, signed a $40,000 promissory note on behalf of CTI with plaintiff and Ronald Ferguson. Michael used the loan to enable CTI to assume debt for Deo and Near, which in turn caused them to tender their shares of CTI. Also around the same time, Michael, using personal guarantees, secured notes from other entities, one for $15,000 and another for $10,000. The proceeds were also used to pay laboratory fees and to purchase equipment.

Deo and Near resigned from CTI on July 3, 1991. The same day, Michael appointed two new directors, his wife, Frances, and Taylor, who were aware of the promissory note, to the board of CTI. Under the new board, CTI began doing business as Pinnacle Environmental Services ("CTI/Pinnacle"), a Michigan corporation. Although Michael was the sole shareholder

of CTI/Pinnacle, Michael, Frances and Taylor were all officers and directors. Michael testified that CTI/Pinnacle performed the same type of work as CTI; that it was the same company as CTI for all intents and purposes; and it continued operations at the same location.

Ronald Ferguson died in November 1992. Michael asserted that, within six months after Ronald Ferguson's death, he attempted to make a payment on the promissory note, but that Kittredge Klapp, an attorney who had represented Ronald Ferguson, Richfield and plaintiff refused it. Conversely, Klapp denied that Michael had attempted to tender payment on the promissory note, but he did recall a conversation during which Michael acknowledged the debt and he suggested that Michael contact plaintiff about it.

CTI/Pinnacle stopped performing work for Richfield in late 1993 or early 1994. In 1995, on CTI/Pinnacle's behalf, Michael pleaded guilty to two misdemeanor counts of theft by deception or tampering of records. The Ohio State Highway Patrol seized all CTI/Pinnacle's records. In early 1996, letters were sent to CTI/Pinnacle's core customers to inform them that CTI/Pinnacle was ceasing operations. CTI/Pinnacle also notified some of its creditors of the dissolution, but plaintiff was not among those notified. CTI/Pinnacle then sold its equipment and assets, and the proceeds were used to pay bank loans personally secured by Michael, including the $10,000 and $15,000 notes. Michael paid the balance of another $35,000 loan in full with his personal credit cards.

In 2003, CTI/Pinnacle was dissolved for failure to file annual reports for three consecutive years. Plaintiff claimed that she never received any address change notification required under the note. In 1996, she sent two or three letters to CTI/Pinnacle's address as listed on the note, all of which were returned. Michael, however, did receive a letter from plaintiff through CTI/Pinnacle's registered agent in May 1996, after CTI/Pinnacle ceased operations.

Around the time CTI/Pinnacle ceased operations, Michael formed ART, which was an environmental consulting business that performed site assessments and assisted in obtaining permits. ART performed permitting work and environmental site assessments, but it had no drilling equipment or trucks. ART did, however, service CTI/Pinnacle's core clients, and the two remaining CTI/Pinnacle employees were offered positions with ART. Michael was the sole shareholder, director and president, and Frances was the secretary of ART. Taylor was one of the employees of ART. Michael claimed he intended to pay plaintiff's promissory note after starting ART.

In October 2003, plaintiff filed a complaint against Michael, CTI/Pinnacle, and any shareholders and/or successor interests to be named later. Plaintiff alleged claims for breach of contract, third-party intended beneficiary and fraudulent misrepresentation for failure to repay the $40,000 promissory note. In June 2004, she moved for summary disposition pursuant to MCR 2.116(C)(9) and (C)(10). Plaintiff argued that defendants had failed to state a valid defense, their actions constituted fraud, and there was no genuine issue of material fact. Defendants replied, arguing that plaintiff had not shown that it was appropriate to pierce the corporate veil.

On October 1, 2004, plaintiff filed an amended complaint, adding ART, Frances, and Taylor as defendants. Plaintiff asserted a breach of contract action against CTI/Pinnacle, a third-party beneficiary action against any defendant who benefited from an alleged prohibited

distribution of CTI/Pinnacle or ART assets, and a fraudulent misrepresentation claim. Plaintiff alleged a breach of director dissolution duties regarding CTI/Pinnacle against Frances and Taylor and successor liability regarding CTI/Pinnacle against ART. On February 23, 2005, the trial court entered a default judgment against CTI/Pinnacle, granting plaintiff's motion for default for failure to appear.

In October 2005, the trial court conducted a bench trial. In January 2006, after the parties filed their proposed findings of fact and conclusions of law, the trial court determined that plaintiff was entitled to judgment against all defendants jointly and severally for $40,000 plus interest and costs. The trial court entered judgment for plaintiff in the amount of $145,219.54, which constituted the $40,000 promissory note, $94,072.78 in interest, and $11,146.76 in statutory interest.

In February 2006, plaintiff moved for case evaluation sanctions pursuant to MCR 2.403(O). Plaintiff asserted that she had accepted a $40,000 award at the June 29, 2004, case evaluation hearing. Plaintiff claimed that Michael had rejected the award and CTI/Pinnacle failed to respond, which constituted a rejection of the award. Plaintiff argued that she was entitled to actual costs incurred after defendants rejected the award because she had obtained a decision in her favor that was not more favorable than the case evaluation award. Plaintiff requested a judgment of $22,620.75 in costs and expenses against all defendants. Defendants did not respond to plaintiff's motion. On February 14, 2006, the trial court entered a judgment for case evaluation costs against Michael, CTI/Pinnacle, Frances, and Taylor in the amount of $22,620.75.

II. Piercing Corporate Veil

A. Standard of Review

We review a trial court's findings of fact after a bench trial for clear error and its legal conclusions de novo. MCR 2.613(C); *Harbor Park Market, Inc v Gronda*, 277 Mich App 126; 130; NW2d ____(2007); *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 249; 701 NW2d 144 (2005). We give regard to the "special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). A trial court's findings are clearly erroneous only when the appellate court is left with a definite and firm conviction that a mistake has been made. *Harbor Market Park, supra*.

B. Analysis

Both parties and the trial court agreed that, under a choice of law provision within the promissory note, Ohio law applies. Under Ohio law, shareholders, directors, and officers are generally not liable for the debts of a corporation. *Belvedere Condo Unit Owners' Ass'n v RE Roark Cos*, 67 Ohio St 3d 274, 287; 617 NE2d 1075 (Ohio, 1993). The corporate veil may, though, be pierced and liability imposed:

> [T]he corporate form may be disregarded and individual shareholders held liable for corporate misdeeds when (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable

> was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong. [*Belvedere*, *supra* at 289.]

In regard to the first element, we agree with the trial court that the evidence supports a finding that Michael's control over CTI/Pinnacle was so complete that CTI/Pinnacle had no separate mind, will, or existence of its own. Michael obtained the promissory note at issue in violation of CTI's charter. He specifically testified that his CTI shareholders were unaware that he had obtained the note in his capacity as president of CTI. Later, Michael improperly dissolved CTI/Pinnacle by selling assets to repay loans that had been personally secured by Michael. Further, the record indicates a lack of documentation in regard to CTI/Pinnacle and there was testimony that meetings were unduly informal and no minutes were taken. Here, the record supports the conclusion that Michael simply disregarded the corporate form of CTI/Pinnacle to exercise complete control over it.

There is a split of authority in Ohio courts regarding the second element required to pierce the cooperate veil.[1] Some courts require a plaintiff show actual fraud or an illegal act while most courts permit the corporate veil to be pierced upon a showing of an "unjust or inequitable act."[2] Although Michael contests the "unjust or inequitable act" approach to piercing a corporate veil, his main contention is that the trial court's findings do not support the conclusion that Michael committed fraud or an illegal act. We disagree, and conclude that the trial court did not commit clear error in finding that Michael's control over the corporation was exercised in such a manner as to commit fraud or an illegal act against plaintiff.

The trial court indicated that Michael did not harbor evil intent against plaintiff, and even intended to personally repay her. However, the trial court also found that Michael, in obtaining the promissory note from plaintiff's now-deceased husband, acted on his own in an attempt to keep CTI operational. Further, Michael misrepresented his power as president of CTI to obtain the loan without Deo's and Near's approval, which was required by CTI's charter. Michael then used those proceeds to assume debt and acquire Deo's and Near's shares in CTI. After acquiring

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[1] In Ohio, the decisions of one appellate district are not binding on the other appellate districts. *State v McDowell*, 150 Ohio App 3d 413, 418; 781 NE2d 1057 (2002); see also S Ct R Rep Op No 2(G)(2).

[2] *Wiencek v Atcole Co*, c, 244-245; 671 NE2d 1339 (1996); *Robert A Saurber Gen'l Contractor, Inc v McAndrews*, unpublished opinion (Powell, J) of the Ohio Court of Appeals, issued December 20, 2004 (Docket No CA2003-09-239); 2004 WL 2937627; *State v Tri-State Group, Inc*, unpublished opinion (DeGenaro, J) of the Ohio Court of Appeals, issued August 20, 2004 (Docket No 03 BE 61); 2004 WL 1882567; *Sanderson Farms, Inc v Gasbarro*, unpublished opinion (Brown, J) of the Ohio Court of Appeals, issued March 25, 2004 (Docket No 01AP-461); 2004 WL 583849; *Stypula v Chandler*, unpublished opinion (Rice, J) of the Ohio Court of Appeals, issued November 26, 2003 (Docket No 2002-G-2468); 2003 WL 22844296. In the instant case, we need not decide whether unjust or inequitable acts may be sufficient to satisfy the second prong of *Belvedere* because the trial court applied the stricter "fraud or illegal act" test.

Deo's and Near's shares, Michael appointed his wife and friend as directors of CTI/Pinnacle. Frances and Taylor were aware of Michael's improper actions in regard to the note. When CTI/Pinnacle ceased operations, plaintiff was not informed of any address changes, even after Michael received a letter from plaintiff requesting payment of the loan through CTI/Pinnacle's registered agent. Yet, CTI/Pinnacle ignored the request, and sold equipment and assets to repay secured bank loans and two other notes instead. As the trial court stated, "the fact of the matter remains plaintiff was not paid, and the fact of the matter remains that the dissolution of the company was not lawful." The trial court found that the CTI/Pinnacle failed to properly distribute its assets, and failed to provide proper notice to creditors that it was ceasing operations. We agree with the trial court that, when considering the entire lower court record, sufficient evidence and findings support the conclusion that Michael, when improperly obtaining the loan on behalf of CTI, and in selling CTI/Pinnacle's assets, attempted to avoid paying plaintiff though her note was due, and thereby exercised CTI/Pinnacle in a manner to defraud or commit an illegal act upon plaintiff.

With respect to the third element, injury or unjust loss on the part of the one seeking to pierce the corporate veil, the trial court found that, as a result of the actions of Michael and CTI/Pinnacle, plaintiff lost $40,000. We agree with the trial court that Michael's improper obtainment of the note, CTI/Pinnacle's failure to provide plaintiff with changes of address for her to request payment, CTI//Pinnacle's ignoring her request for payment and improper distribution of CTI/Pinnacle's assets resulted in a loss to plaintiff. See *Belvedere*, *supra* at 289. Therefore, we conclude the trial court did not commit clear error in piercing CTI/Pinnacle's corporate form.

2. Personal Liability On Promissory Note[3]

Frances, Taylor, and ART contend that the trial court erred in holding them personally liable for the promissory note because they were not CTI/Pinnacle shareholders. We agree.

Frances, Taylor, and ART correctly assert that Ohio case law does not allow a plaintiff to pierce the corporate veil to hold non-shareholders personally liable for the debts of a corporation. Plaintiff relies on *State ex rel Attorney Gen'l v Std Oil Co*, 49 Ohio St 137, 184-185; 30 NE 279 (1892), asserting that it holds officers and directors liable. Although the court in that case referenced the "stockholders, officers, and directors" of the defendant's corporation, that portion of the opinion is where the issue is posed – not where it states the court's determination. *Id.* at 184. The holding applies only to stockholders, as the Court states in the syllabus:[4]

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[3] The parties do not fully address and the lower court record is unclear whether the trial court held the directors of CTI/Pinnacle personally liable under an independent theory that the directors breached their dissolution duties. Argument must be supported by citation to appropriate authority or policy. MCR 7.212(C)(7); *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Although we do not address this issue, we note that directors' dissolution duties generally run to the corporation and not to third parties.

[4] Pursuant to S Ct R Rep Op No 1(B)(1), "The law stated in a Supreme Court opinion is (continued…)

> Where all, or a majority, of the *stockholders* [emphasis added] composing a corporation do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company, in the same manner as if it had been a formal resolution of its board of directors, and the act so done is *ultra vires* of the corporation, and against public policy, and was done in their individual capacities, for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation, and, to prevent the abuse of corporate power, may be challenged as such by the state in a proceeding in *quo warranto*. [*Std Oil, supra* at 157.]

We find no support that would apply *Std Oil* or *Belvedere* to impose personal liability on directors or officers who do not hold shares in a corporation. Therefore, personal liability may not be imposed on directors and officers who do not hold shares in a corporation. Accordingly, we reverse the portion of the judgment holding Frances and Taylor personally responsible.

3. ART Has No Liability For CTI/Pinnacle

ART argues that it was a separate corporation from CTI/Pinnacle and there was no evidence that it ever ratified assumed, affirmed, or accepted any debt or other obligations of CTI/Pinnacle. We agree. The trial court found that ART was formed to take over some of CTI/Pinnacle's business and was the same type of business, which the trial court categorized as waste management.

Assuming that ART purchased some assets from CTI/Pinnacle, the general rule of successor liability provides that, when one purchases another corporation's assets, the buyer is not liable for the debts and obligations of the seller corporation. *Pilkington N Am, Inc v Travelers Cas & Sur Co*, 112 Ohio St 3d 482, 491; 861 NE2d 121 (2006). Four exceptions to this rule include when: the buyer agrees to assume liability, the transaction amounts to a de facto consolidation or merger, the buyer is merely a continuation of the seller, or the transaction is entered into fraudulently for the purpose of avoiding liability. *Id.*

Here, there is no evidence that ART agreed to assume liability, and there is no evidence of a consolidation or merger between ART and CTI/Pinnacle. ART retained several of CTI/Pinnacle's core clients, and two CTI/Pinnacle employees were offered positions with ART. Michael served as president and sole shareholder of ART, and Frances was the secretary. However, some, if not most, of CTI/Pinnacle's equipment and assets were sold, and ART did not have any drilling equipment or trucks. CTI/Pinnacle performed contracting work, environmental services, and remedial action, whereas ART was a consulting business that performed site assessments and helped its customers obtain permits. Although CTI/Pinnacle and ART had some of the same customers and they both performed work in the environmental field, the

(…continued)

contained within its syllabus (if one is provided), and its text, including footnotes." Further, "If there is disharmony between the syllabus of an opinion and its text or footnotes, the syllabus controls." S Ct R Rep Op No 1(B)(2).

evidence does not support a conclusion that ART was a mere continuation of CTI/Pinnacle. Further, there is no evidence that ART was formed and operated for the purpose of avoiding CTI/Pinnacle's liabilities. Therefore, successor liability was inappropriate, and we vacate the portion of the judgment against ART.

4. Case Evaluation Sanctions

ART, Frances, and Taylor argue that the trial court erred in issuing case evaluation sanctions against them. We agree.

We review de novo the decision to award case evaluation sanctions, *Ayre v Outlaw Decoys, Inc*, 256 Mich App 517, 520; 664 NW2d 263 (2003), and the interpretation and application of a court rule, *Haliw v Sterling Heights*, 471 Mich 700, 704; 691 NW2d 753 (2005).

MCR 2.403(O)(1) provides, in relevant part, "If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation." Case evaluation was conducted on June 29, 2004, and the panel unanimously granted plaintiff a $40,000 award, jointly and severally against Michael and CTI/Pinnacle. Michael rejected the award, and CTI/Pinnacle failed to respond. CTI/Pinnacle's failure to respond to the case evaluation within 28 days constitutes a rejection of the award. MCR 2.403(L)(1); *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 457; 540 NW2d 696 (1995). Following a bench trial, the trial court entered a $40,000 judgment in plaintiff's favor, jointly and severally against Michael, CTI/Pinnacle, ART, Frances, and Taylor.

The notice of case evaluation does not mention ART, Frances, or Taylor, likely because they were not named parties to the action until October 1, 2004, when plaintiff filed an amended complaint, adding them as defendants. Although plaintiff's original complaint included as defendants any shareholders and/or successor interests to be named later, the case evaluation notice did not. The trial court erred in issuing case evaluation sanctions against ART, Frances, and Taylor when they did not participate in case evaluation and were not named parties to the lawsuit at that time. We therefore reverse the portion of the judgment regarding case evaluation sanctions that applies to ART, Frances, and Taylor.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood